

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT PERMIT
DENIED BY THE CITY OF SEATTLE
TO MARINE POWER AND EQUIPMENT
COMPANY, INC.,

MARINE POWER AND EQUIPMENT
COMPANY, INC.,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

SHB No. 80-40

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER

This matter, the review of a shoreline substantial development permit denied by the City of Seattle to appellant, came on for hearing before the Shorelines Hearings Board, Nat W. Washington, Chairman, David Akana, Robert S. Derrick and A. M. O'Meara, Members, convened at Seattle, Washington on January 8 and 9, 1981, and March 30, 1981. William A. Harrison, Administrative Law Judge, presided. Member Gayle

1 Rothrock attended the hearing of March 30, 1981, and read the hearing
2 transcripts of January 8 and 9, 1981.

3 Appellant appeared by its attorney, Charles E. Siljeg. Respondent
4 appeared by Elizabeth A. Edmonds, Assistant City Attorney.

5 Reporters Lorraine Everage, Dorothy Nevin and Kim Otis recorded
6 the proceedings.

7 Having heard or read the testimony, having examined the exhibits,
8 having considered the contentions of the parties; and the Board having
9 served its proposed decision upon the parties herein, and having
10 received exceptions thereto and replies to said exceptions; and the
11 Board having considered the exceptions, and having granted the
12 exceptions in part and denied said exceptions in part, the Board now
13 makes these

14 FINDINGS OF FACT

15 I

16 Appellant, Marine Power and Equipment Company, Inc., owns and
17 operates a facility for repairing commercial ships on Lake Union in
18 Seattle. Appellant is located about midway between Gasworks Park and
19 the Aurora Bridge in a segment of shorelines characterized by
20 industrial and commercial uses. Bulkheading and over-the-water piers,
21 workshops and covered moorages predominate in that segment of
22 shoreline.

23 II

24 Apparently under authority of the River and Harbor Act of 1899,
25 the United States government prescribed, prior to 1907, a "U.S.
26 Bulkhead and Pierhead Line" (U.S. line) in Lake Union. This line,

1 generally, lies waterward of the natural shore of Lake Union and
2 parallel to it. At numbered locations around Lake Union, however,
3 this U.S. line forms 23 embayments known as waterways.

4 III

5 Waterward of the U.S. line there is the "Seattle Construction
6 Limit Line" (Seattle line) created by municipal ordinance.

7 IV

8 The Seattle Shoreline Master Program (SSMP), which became
9 effective in 1976, designates different environments in which
10 different rules apply. In this case, the SSMP designates the area
11 landward of the U.S. line as urban stable/Lake Union (US/LU). The
12 area waterward of the U.S. line is designated conservancy management
3 (CM) out to the Seattle line and a diagonally subtended line between
14 the corners of the Seattle line. Waterward of that line, Lake Union
15 is designated conservancy natural (CN). See Exhibit R-1.

16 V

17 Appellant's primary pier and building border one side of waterway
18 21 while a disused pier and building owned by appellant border the
19 other side. Most of appellant's repair is done on ships berthed in
20 front of its main building. The ordinary situation, however, is that
21 appellant gang ties or anchors ships side by side so that the surface
22 of waterway 21 to the limit of the CM environment is completely or
23 nearly taken up. These ships are under repair, awaiting repair or are
24 appellant's own tugs being stored.

VI

On February 4, 1980, appellant applied to Seattle for a shoreline substantial development permit. The proposed development consisted of:

Drive two, 20 pile dolphins and enlarge one existing 3 pile dolphin to 20 pile. The purpose is to provide secure moorage for vessels and also provide protection from inadvertent incursion into adjacent property owners area by our vessels moored in Waterway 21.

Ships moored to the dolphins would be where they are likely to be now without the dolphins. Construction of the dolphins would improve the safety of the moorage which appellant could offer its customers whose ships are awaiting repairs. The extent of the repair activity at appellant's facility would not be materially changed whether the dolphins are approved or not, provided that repairs are not allowed on ships moored at the dolphins.

While the application is ambiguous, appellant clarified in testimony that the dolphins would be between the U.S. line and Seattle line. The dolphins would be within the CM environment.

VII

Under a "waterway permit" most recently renewed in 1974, the respondent City of Seattle authorizes appellant to locate vessels in the waterway (49,195 square feet) in exchange for an annual use fee.

A high, steep vine-covered bank at the landward end of waterway 21 presently discourages access to the water from the adjacent street. There was no evidence presented of any use of waterway 21 to the limit of the CM environment by anyone but appellant or its customers.

VIII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The City first asserts that approval of the proposed dolphins would result in the extension or expansion of a non-conforming use, namely marine construction, repair and dismantling, in violation of the SSMP, Section 21A.17 referring to the Seattle Zoning Ordinance Section 5.34. We disagree.

The City is correct insofar as it contends that the marine repair which it authorized (see Finding of Fact II re: "waterway permit") in waterway 21 in 1974 became a non-conforming use when the 1976 SSMP designated waterway 21 as CM in which marine repair is prohibited. SSMP Table 3 at Section 21A.40 and Section 21A.17 referring to Seattle Zoning Ordinance Section 5.3. However, Sections 3.22 and 3.03 of the Seattle Zoning Ordinance establish that the "use" spoken of in Section 5.3 is the purpose for which structures, such as the dolphins, are intended. Thus, appellant's application now under review must be measured by its stated purpose of using the dolphins for open, wet moorage. In contrast to marine repair which is a non-conforming use, open, wet moorage is a permitted use in the CM environment (waterway 21). SSMP Table 3 at Section 21A.40. A substantial development permit conditioned to prohibit marine construction, repair and

1 dismantling would thus be responsive to appellant's application and
2 would not extend nor expand a non-conforming use in violation of the
3 SSMP.

4 II

5 The City next asserts, correctly, that the dolphins constitute
6 piling which are permitted in the subject CM environment only as a
7 special use. SSMP, Table 3 at Section 21A.40. This is a
8 qualification of the general rule cited by appellant that piling will
9 be authorized to enable a water dependent use to extend over water as
10 its functions require. SSMP, Section 21A.104(b). A special use must
11 meet the additional four conditions of the SSMP, Section 21A.71(h):

- 12 1. the use will not have a significant adverse
13 effect upon the environment or other adjacent or
14 nearby uses, or such adverse effects can be
mitigated, or the benefits of permitting such use
outweigh such adverse effects;
- 15 2. the use will not interfere with public use of
16 public shorelines;
- 17 3. design and appearance of the development will be
18 compatible with the design and appearance of
surrounding uses; and
- 19 4. the use will not be contrary to the general
20 intent of the Shoreline Master Program of the City of
Seattle.

21 The City urges that the vessels and facilities associated with
22 appellant's facility are incompatible with the neighboring uses. We
23 have found to the contrary, and conclude that the requested use of the
24 proposed dolphins for moorage meets Section 21A.71(h)(1) and (3), and
25 (4), above.

1 Appellant has also shown, on this record, that its proposed use
2 will not interfere with public use of public shorelines. It did this
3 by showing there is no actual public use of waterway 21. Failing to
4 rebut this, the City urged consideration of the public use which the
5 law may allow in waterway 21 in contrast to actual public use. Yet
6 the City has issued a "waterway permit" which, at the time of hearing
7 in this matter, authorized appellant to moor vessels in waterway 21 to
8 the practical exclusion of any public use. While the City urged that
9 it may take future action to terminate that permit, such was
10 speculative at the time of hearing in this matter. Neither did the
11 City present persuasive legal authority for the proposition that the
12 waterway permit was issued contrary to its enabling law whatever that
13 law may be. While amicus curiae cited language from chapter 79.16 RCW
14 in its memorandum, there was insufficient evidence in this record for
15 us to conclude that the waterway 21 in question is one of the specific
16 waterways addressed in that statute. Thus, we conclude that appellant
17 has shown compliance with Section 21A.71(h)(2) on this record.

18 A substantial development permit allowing construction of the
19 dolphins solely for open, wet moorage would meet the SSMP special use
20 conditions, Section 21A.71(h).

21 III

22 Appellant's proposed development would be consistent with the
23 Shoreline Management Act and SSMP if approved by a substantial
24 development permit containing the following conditions:

- 25 1. The dolphins shall be located landward of the
26 Seattle Construction Limit Line.

2. The dolphins shall not be used for the purpose of marine construction, repair or dismantling but shall be used solely for the purpose of moorage.

IV


Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The denial by the City of Seattle of appellant's application for a shoreline substantial development is hereby reversed and remanded for issuance of a permit consistent with Conclusion of Law III, hereof.

DONE at Lacey, Washington, this 7th day of August, 1981.


WILLIAM A. HARRISON
Administrative Law Judge

CONCUR:
SHORELINES HEARINGS BOARD

NAT W. WASHINGTON, Chairman

GAYLE ROTHROCK, Member

DAVID AKANA, Member


A. M. O'MEARA


ROBERT S. DERRICK, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER

1 We concur in the result.

2
3
4 Nat W. Washington
5 NAT W. WASHINGTON, Chairman

Gayle Rothrock
GAYLE ROTHROCK, Member

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7 David Akana
8 DAVID AKANA, Member

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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER